BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of	)	
Andrew Heaney,	)	**MUR 7006**
Heaney for Congress, and	)	
Pat Gosselin, as Treasurer	)	

RESPONSE OF ANDREW HEANEY AND HEANEY FOR CONGRESS TO THE COMPLAINT

Andrew Heaney, Heaney for Congress, and Pat Gosselin, as Treasurer (collectively "Heaney Respondents"), through counsel, hereby respond to the notification from the Federal Election Commission ("Commission") that a complaint (collectively the "complaint") was filed against them in the above-captioned matter. The complaint, filed by the Campaign for Accountability, a known partisan organization, is nothing more than a political publicity stunt that contains spurious allegations based on conjecture in an effort to generate headlines. For the reasons set forth below, the complaint is without merit and is legally deficient because it fails to allege a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or Commission regulations. The Heaney Respondents generally and specifically deny the Complainant's allegations, and we respectfully request that the Commission dismiss the complaint and close the file.

The complaint fails to satisfy the Commission's basic regulatory requirements by making breathless allegations that are not supported by the facts or Commission precedents and by doing so in speculative terms, claiming "coordination" based on communications the complaint predicts the Super PAC "will have made" at some point in the future. Compl. ¶ 19. Ignored by the Complainant is what the Commission has already said regarding the speculative accusations

contained in the complaint. Speculation that a party at some future date may violate a Commission regulation cannot shift the burden to the Heaney Respondents to respond. *See* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E Thomas at 2. Here, Complainant's speculation is insufficient, as "mere 'official curiosity' will not suffice as the basis for FEC investigations . . ." *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981). Accordingly, there is no factual or legal basis for the Commission to find reason to believe in this matter, and the Commission must dismiss the complaint and close the file against the Heaney Respondents.

ANALYSIS

1. The Complaint's Speculation Regarding "Coordination" Is Unsupported by Factual Evidence

The theory advanced by the Complainant is as simple as it is wrong: According to the complaint, coordination can be established simply because of mere donations to a Super PAC. Both the Commission and the Office of General Counsel ("OGC") have already said otherwise, and those precedents warrant dismissal now.

First, the only concrete allegation contained in the complaint is that several corporations with ties to the Heaney family gave contributions to a Super PAC. There is nothing illicit about this. Corporations have a First Amendment right to make donations to Super PACs. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (invalidating BCRA's prohibition on corporate independent expenditures); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc) (holding that limits on contributions to independent expenditure-only committees violate the First Amendment).

Second, that the contributions from companies affiliated with Mr. Heaney aggregate to $20,000 is legally irrelevant.[1] In Advisory Opinion 2006-04, the Commission considered a series of questions from then-Representative Tom Tancredo. Tancredo's campaign committee wanted to donate funds to a state ballot issue committee equal to 50% of the state committee's total contributions. In that extreme case, the Commission found that the large amount of the donation alone would justify a finding that Tancredo financed the state committee in violation of FEC regulations. A.O. 2006-04 at 3-4. The Commission's reasoning was clear: Donations of half a committee's funds by a single donor are enough by themselves to find that a donor financed a committee. Smaller donation amounts require the Commission to consider more factors than just the size of the donation itself. *See id.* at 3-5.

Here, the $20,000 in contributions from companies affiliated with Mr. Heaney represents only slightly more than 10% of the $196,000 total amount raised by the New York Jobs Council through the first quarter of 2016. Even limiting the relevant time period to the initial donations to the Super PAC, the $20,000 represents only one-third of the initial $60,000 raised. Compl. ¶ 8. One-third, much less ten percent, is not close to half. Complainant must point to more than the amount of the contributions to carry its burden. A.O. 2006-04 at 4-5. Because the complaint does not point to any other facts and instead relies on fallacious innuendos, its allegations are legally deficient; and the Commission should find no reason to believe that the Heaney Respondents financed the New York Jobs Council.[2]

[1] For the reasons explained on pages 4-5 and in the Commission's decisions in MUR 6611 (Ruderman) and MUR 6277 (Kirkland), it is inappropriate to lump contributions from Mr. Heaney's sister with those from the corporations affiliated with Mr. Heaney. That a contribution originates from a relative does not indicate illicit activity.

[2] Tancredo's campaign committee also proposed to donate funds equal to 25% of the total contributions received by the state ballot initiative committee. The Commission determined that Rep. Tancredo's proposed donation alone would not be enough to justify a finding that the state committee

Third, that $35,000 of the Super PAC's contributions came from a company controlled by the candidate's sister is of no consequence. In MUR 6611 (Ruderman), OGC recommended that the Commission find no reason to believe that a violation occurred regarding allegations similar to those here. In that MUR, an independent expenditure-only political committee was funded almost exclusively by a candidate's mother; and that candidate's mother appeared in a campaign advertisement. From these scant facts, the complainant declared that the candidate's mother "obviously possessed material information regarding the campaign's plans and strategy, and used the information in determining the direction and content of her attack ads." First General Counsel Report at 2, MUR 6611 (Ruderman). OGC recommended that the Commission find no reason to believe that illegal coordination occurred.

The same conclusion follows here. As in MUR 6611, the Campaign for Accountability points to a relationship between the candidate and a financial supporter of a Super PAC. Compl. ¶¶ 7-8. Also as in MUR 6611, the complainant cites some alleged campaign involvement by the Super PAC contributor — the involvement here, however, is even more minimal than that alleged in MUR 6611. There, the mother of the candidate actually appeared in a campaign advertisement, whereas here the candidate's sister merely owned a corporation that was one of several contributors to the Super PAC. Given the similar allegations — and that the current matter is an even easier case than that presented in MUR 6611 — the result ought to be the

(continued...)

would be financed by Rep. Tancredo. Instead, the Commission cited Rep. Tancredo's intentions to "share . . . both [his] polling data and general 'campaign strategy'" with the state committee and to run separate ads endorsing the state ballot initiative as the critical factors that would require a finding that Rep. Tancredo's committee financed the state committee. A.O. 2006-04 at 4-5. This further supports the point that merely citing donations is not enough to state a violation of the campaign finance laws governing coordination.

same.[3] Complainant is left only to speculate about what these bare facts "suggest[]" and what, under complainant's awkward theory, is "almost certainly" the case. Compl. ¶¶ 14, 16

The Commission also dismissed a complaint containing similar allegations in MUR 6277 (Kirkland). In that matter, a candidate's brother was accused of illegal coordination. Even though the facts in MUR 6277 presented a closer call than those in MUR 6611, the ultimate result was the same; and the matter was dismissed. As the controlling group of Commissioners explained:

> Nor can [the FEC] find reason to believe coordination occurred merely because [the respondent] is the candidate's brother. Indeed, the Commission has made clear in related contexts that a mere family relationship is not enough to establish an agency relationship or otherwise support an inference of coordination.

MUR 6277 (Kirkland), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 10. Kirkland applies with equal force here; thus, OGC should recommend a finding of no reason to believe, which the Commission should adopt.

[3] That the Commission split 3-3 on OGC's recommendation in MUR 6611 is of no consequence. First, merely because three commissioners thought an investigation was warranted ought not change OGC's independent view of the correct result. Second, the D.C. Circuit has already held that the three commissioners who decline to pursue a matter constitute the controlling bloc for purposes of review. *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951 (D.C. Cir. 1998). Thus, a finding of no reason to believe is the controlling view in MUR 6611.

Moreover, given that OGC recommended no reason to believe in MUR 6611, which was supported by a controlling group of commissioners, both the Administrative Procedure Act and fundamental due process preclude a different result here. *See* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Commissioners David M. Mason and Hans A. von Spakovsky at 2-3, 10 (when the Commission has not proceeded against a certain type of respondent previously, it should not proceed against similarly situated respondents in the future unless the public has notice through a rulemaking); *accord FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2315-16 (2012) ("In the context of a change in policy . . . an agency, in the ordinary course, should acknowledge that it is in fact changing its position and 'show that there are good reasons for its new policy.'" (quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009))).

Fourth, the complaint's speculation regarding Mr. Heaney's role in "directing" contributions from his companies to the Super PAC is irrelevant because Mr. Heaney was not a candidate at the time of the contributions. As the complaint notes, the contributions in question occurred in mid-June 2015. *Id.* ¶ 7. Mr. Heaney did not declare his candidacy until August 5, 2015, when he decided to seek office and filed his Statement of Candidacy with the Commission. *Id.* Any actions Mr. Heaney may or may not have taken before then are irrelevant.

The Campaign for Accountability offers nothing but speculation in support of its coordination accusations.[4] That corporations contributed to a Super PAC is indicative of nothing illicit. The complaint's failure to offer any support for its allegations leaves only one result: There is no reason to believe that a violation occurred.

2. Such Speculation Fails to Establish Reason to Believe

The Commission has already held that simple speculation by a complainant is insufficient and that when a complaint fails to carry its burden and does not establish that there is reason to believe that a violation of the Act has occurred, the matter must be dismissed. Similarly, the Commission has held that the burden does not shift to a respondent in an enforcement action merely because a complaint has been filed and accusations made, especially such as here when the complaint fails to allege facts that constitute a violation under the Act and Commission regulations. *See* MUR 4850 (Deloitte & Touche, LLP, *et al.*), Statement of Reasons of

[4] The Campaign for Accountability cites 11 C.F.R. § 300.2(c)(4)(ii) and its "two-year time-out" in support of its complaint. Compl. ¶ 18. Section 300.2(c)(4)(ii) only applies to entities that were once established, financed, maintained, or controlled by a sponsor and that seek an advisory opinion from the Commission that they are now independent from their former sponsor. It has no application to entities not seeking an advisory opinion from the Commission on their independence or entities that were never established, financed, maintained, or controlled by a sponsor. *See* Explanation and Justification, 67 Fed. Reg. 49064, 49084-85 (July 20, 2002). It also has no application to for-profit corporations such as those at issue here. *See id.* at 49083 (listing the entities to which the regulation is applicable, including solely political entities, federal candidates, and federal officeholders).

Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2 ("The burden of proof does not shift to a respondent merely because a complaint is filed.").

Moreover, a reason to believe finding is warranted only if a complaint sets forth specific credible facts, which if true, would constitute a violation of the Act. *See* MUR 6554 (Friends of Weiner), Factual & Legal Analysis at 5 ("The Complaint and other available information in the record do not provide information sufficient to establish [a violation]."). Here, the Campaign for Accountability has failed to allege such specific credible facts. The Commission has already held that unwarranted legal conclusions drawn from asserted facts, or mere speculation, will not be accepted as true and cannot support a finding of reason to believe. *See* MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 2 ("Unwarranted legal conclusions from asserted facts will not be accepted as true." (internal citation omitted)); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom and Scott E. Thomas at 2 (complaint failed to alleged violation of the Act).

Nor is a respondent obligated to deny that which is not alleged, or is alleged in conclusory fashion, as the Campaign for Accountability has done here. *See* MUR 4850 (Fossella), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 (rejecting the Office of General Counsel's recommendation to find reason to believe because the respondent did not specifically deny conclusory allegations and holding that "[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to respondents."); MUR 5467 (Michael Moore) First General Counsel Report

at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of [the Act] has occurred." (quoting MUR 4960, Statement of Reasons of Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas)).

The complaint's coordination allegation is based entirely on its speculation about what may occur at some point in the future. Allegations of coordinated communications require the Campaign for Accountability to identify an offending communication.[5] *See* Compl. ¶ 21 (noting that there must be a "communication" that satisfies the Commission's three-part test for a violation to occur). As the complaint frankly admits, it can point to no such communication. Instead, the Campaign for Accountability is left to repeatedly pontificate about communications "the super PAC will have made," *id.* ¶ 19, or communications there are a "strong likelihood" the super PAC will make, *id.* *See also id.* ¶¶ 23, 26 (asserting that "future public communications . . . will likely be prohibited"). The Commission's job is to investigate credible allegations of wrongdoing, not to punish offenses that even the complaint admits have not occurred. *See id.* A lack of information, or inadequate information, does not support a finding of reason to believe, and cuts against the complaint. MUR 4545 (Clinton/Gore '96 Primary Committee, Inc.), First General Counsel Report at 17 (because "the available evidence is inadequate to determine whether the costs . . . were properly paid, the complaint's allegations are not sufficient to support a finding of reason to believe . . . ."). That the Campaign for Accountability has failed to offer

[5] Realizing that it has cited no extant communication, the complaint mentions a series of tweets displayed on the New York Job Council's Twitter feed. Compl. ¶¶ 9, 27. The complaint must cite a "public communication" to satisfy the content standard of the Commission's coordinated communications rule. *See* 11 CFR § 109.21(c)(2)-(4). However, the definition of "public communication" expressly excludes "communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.* § 100.26. Thus, a tweet is not a public communication within the meaning of the Commission's regulations and cannot satisfy the coordinated communication rule's content standard.

any factual support is not the concern of the Heaney Respondents; on the contrary, it mandates dismissal. *See generally* MUR 5878 (Arizona State Democratic State Central Committee), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen (discussing reason to believe standard).

The complaint makes one last desperate attempt to add the veneer of credibility to its accusations by observing that Heaney for Congress and New York Jobs Council employ some of the same vendors. Compl. ¶¶ 24-26. Employing the same vendors proves nothing, as the Campaign for Accountability can only speculate that the vendors did not have the proper firewall procedures in place to prevent the transfer of the private plans, projects, activities, and needs of the campaign to the Super PAC. *See id.* Even if the vendors did not have a firewall policy, the complaint still would be insufficient. As the Commission has observed, "[T]he addition of this firewall safe harbor provision to the coordinated communication rules does not *require* commercial vendors, former employees and political committees to use a firewall. The Commission will not draw a negative inference from the lack of such a screening policy." Explanation and Justification of the Coordinated Communication Rules, 71 Fed. Reg. 33190, 33207 (June 8, 2006). The complaint's coordinated communication allegations, therefore, rest on nothing but a sea of suppositions that, even if believed, do not constitute a violation of the Act or the Commission's regulations.

Prophecy cannot serve as the basis of a complaint. The Campaign for Accountability's speculation about "future public communications" is unavailing and, based upon a legion of past Commission precedent, woefully inadequate to establish reason to believe that a violation occurred. In the words of the OGC, "[t]his is too thin a reed." MUR 6611 (Ruderman), First

General Counsel's Report at 9. The Commission must dismiss the complaint's unsupported coordination allegations.

CONCLUSION

For the reasons stated above, the complaint is without merit; and there is no factual or legal basis for a reason-to-believe finding in this matter. Accordingly, we respectfully request that the Commission dismiss the complaint, close the file, and take no further action.

Respectfully submitted,

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May 2, 2016